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Issue Date: 12 May 2006

CASE NOS.:	**2005-LHC-0499**	**2005-LHC-0717**
OWCP NOS.:	**01-160915**	**01-154716**

In the Matter of

MATTHEW BOLSTRIDGE
Claimant

v.

AGM MARINE
Employer

and

AIG INSURANCE
Carrier

and

ATKINSON CONSTRUCTION
Employer

and

TRAVELERS INSURANCE COMPANY
Carrier

APPEARANCES:

James W Case, Esq., McTeague, Higbee & Case, Cohen, Whitney & Toker, P.A., Topsham, Maine, for the Claimant

Richard van Antwerp, Esq., Robinson, Kriger & McCallum, Portland, Maine for Employer/Carrier (Atkinson/Travelers)

Nelson Larkins, Esq., Preti, Flaherty, Beliveau, Pachios & Haley, Portland, Maine for the Employer/Carrier (AGM Marine/AIG)

BEFORE: Colleen A. Geraghty
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

The present matter is a claim for workers' compensation and medical benefits filed by Matthew Bolstridge ("Claimant") against the employers Atkinson Construction ("Atkinson") and AGM Marine ("AGM" or "AGM Marine"), and their respective insurance carriers, Travelers Insurance Company ("Travelers) and AIG Insurance ("AIG"), under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"). Specifically, the Claimant seeks an award authorizing bilateral carpal tunnel release surgery and compensation for anticipated periods of temporary total disability following the surgery based upon injuries incurred while employed by Atkinson and AGM. After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges for a formal hearing, which was conducted before the undersigned administrative law judge on April 25, 2005 in Portland, Maine.[1]

The Claimant appeared represented by counsel, and an appearance was made on behalf of the Employers and Carriers. The Hearing Transcript is referred to herein as ("TR"). At the hearing, the parties were afforded the opportunity to present evidence and oral argument. Testimony was heard from the Claimant. Documentary evidence was admitted as Joint Exhibit ("JX") 1, Claimant's Exhibits ("CX") 1-13, AGM Exhibits ("AGM EX") 1-8, and Atkinson Exhibits ("ATK EX") 1-2. TR 5-7. Formal papers were admitted as Administrative Law Judge Exhibits ("ALJX") 1-17. TR 73-74. The record was held open to permit the deposition of Dr. Flaherty. Dr. Flaherty's deposition was received and has been marked as CX 14 and admitted. TR 64-67. The parties filed post-hearing briefs, and the record is now closed.

After careful analysis of the evidence contained in the record, the parties' stipulations, and their closing arguments, I have concluded that the Claimant's carpal tunnel syndrome is related to his employment at both Atkinson and AGM Marine, but that AGM Marine is the last responsible employer/carrier liable for the claim. AGM Marine is not entitled to Special Fund relief under Section 8(f) of the Act.

My findings of fact and conclusions of law are set forth below.

[1] The Claimant initially brought a claim against Atkinson Construction. That claim was heard by Administrative Law Judge Daniel Sutton in December 17, 2003. At that hearing, the Claimant testified that following his employment with Atkinson, he worked for AGM. As a result, Judge Sutton remanded the matter to the District Director of the Office of Workers' Compensation Programs as "the evidence suggests it appeared that another party, namely, a subsequent employer which has not been joined, may be liable under the LHWCA for the Claimant's carpal tunnel syndrome." CX 10 at 151. The Claimant subsequently filed a claim against AGM and the two claims were joined and heard before the undersigned.

II. Stipulations and Issues Presented

At hearing, the parties offered separate stipulations for each case. With regard to the claim against Atkinson the parties stipulated to the following: (1) the Act applies to the claim; (2) the alleged injury occurred on January 8, 2001; (3) an employer/employee relationship existed at the time of alleged injury; (4) the notice, claim and controversion were timely; (5) the informal conference was held on May 1, 2003; (6) the average weekly wage at the time of injury was $1,040.39.

With regard to the claim against AGM the parties stipulated to the following: (1) the Act applies to the claim; (2) the alleged injury occurred on or about June 26, 2002; (3) an employer/employee relationship existed at the time of alleged injury; (4) the informal conference occurred on November 18, 2004; (5) the average weekly wage at the time of injury was $1,403.94.

The issues are (1) whether the Claimant's carpel tunnel syndrome was caused by his employment at Atkinson or AGM Marine; (2) which employer/carrier is the responsible employer/carrier; (3) whether AGM is entitled to relief from liability pursuant to Section 8(f) of the Act.[2]

The Claimant alleges that his carpal tunnel syndrome was caused or aggravated by his work at Atkinson. Cl. Br. at 4-8. The Claimant argues that his subsequent work in non-covered employment did not "nullify" the work injury. Cl. Br. at 7-8. In this regard, the Claimant asserts that subsequent to employment with Atkinson the Claimant's hand symptoms did not increase but continued in the same degree and persistence that he had experienced working at Atkinson. Cl. Br. at 8. Thus, the Claimant argues that the need for bilateral surgery arose after his work at Atkinson and his employment since then has not made the need for surgery "any more urgent or necessary." *Id*. Alternatively, the Claimant contends that Atkinson can escape liability only by showing that it is not the last responsible employer. The Claimant asserts that the evidence establishes that he was last exposed to injurious stimuli contributing to his carpal tunnel syndrome when employed by AGM Marine and that AGM is liable for the injury. Cl. Br. at 9.

For its part, Atkinson argues that the Claimant's bilateral carpal tunnel syndrome did not result from his work at Atkinson. Atk. Br. 6-8. Alternatively, Atkinson argues that should the court find that the Claimant's carpal tunnel syndrome resulted from his employment at Atkinson, the Court must then conclude that the Claimant continued to be exposed to further stimuli which aggravated his carpal tunnel condition during his subsequent employment with AGM Marine. Accordingly, Atkinson contends that applying the last responsible employer rule, AGM Marine is liable for the Claimant's medical care and prospective disability compensation. Atk. Br. at 8-10. AGM Marine admits that the Claimant has bilateral carpal tunnel syndrome as a result of workplace activities. AGM Br. at 3. AGM Marine argues that the issue is which maritime employer, Atkinson or AGM Marine, should be responsible for the Claimant's occupational

[2] In its brief, Atkinson contends one of the issues in dispute is whether the claim against the other employer, AGM, was timely under Section 12 of the Act. Atkinson lacks standing to raise this issue. In addition, AGM did not raise the issue in its brief. Therefore, I conclude AGM has abandoned this issue and I need not address the issue herein.

disease. *Id*. AGM Marine asserts that applying the last responsible employer rule, Atkinson is the responsible employer. AGM Br. at 3-4. AGM Marine argues, in the alternative, that should it be determined that AGM Marine is the responsible employer it is entitled to relief from liability from the Special Fund. AGM Br. at 4.

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant is now 35 years old. CX 8 at 19. He is a carpenter and has worked in the trade since he was 15. *Id.* He worked both non-union and union carpentry jobs. In approximately 1997 he joined the Carpenter's Union and has worked since that time on commercial and industrial construction projects. TR 19-20; CX 19-20, 46.

In April 2001 the Claimant was hired by Atkinson Construction to work on the Bath Iron Works land-level construction facility used in the building of navy ships at the Bath Iron Works Corporation ("BIW") in Bath, Maine. CX 8 at 18, 20. The Claimant was hired to perform iron work and pipefitting. He testified that he had some prior experience tying steel, but that he had never performed pipefitting duties previously. CX 8 at 20.

The Claimant's initial assignment was to operate a 90-pound "rock hammer" which is a pneumatic jackhammer with a drill bit attached which was used to drill holes in pre-cast pier sections. CX 8 at 21-22. He performed these duties for a period of approximately five weeks. CX 8 at 22. He was then assigned to install crane rails which required the use of heavy pliers to push, pull, and twist repeatedly with his hands during the course of the day in order to tie the crane rails with heavy wire to anchors in the pre-cast pier sections and to steel reinforcing bars. TR 22-26; CX 8 at 27-29. The Claimant testified that he noticed his hands becoming numb, fatigued and burning. He experienced the symptoms in both hands, but initially his left hand, his dominant hand, was worse that the right. TR 26-27; CX 8 at 29-30, 56-57. The Claimant acknowledged that he had experienced similar symptoms in the left hand before he went to work for Atkinson, but stated he that the symptoms were not as severe or as frequent before he started work at Atkinson. *Id*. The Claimant explained that when the symptoms became too bad in the left hand he would use the right hand more and eventually the symptoms in the right hand increased and his symptoms did not resolve overnight as they had in the past. CX 8 at 32.

The Claimant left Atkinson as a result of a layoff in late November 2000 or early December 2000. He saw Dr. Martha Stewart on January 8, 2001, who diagnosed carpal tunnel syndrome and prescribed a brace. CX 5 at 24. By the end of January 2001, the Claimant reported significant improvement in his symptoms, although he was not employed during this period. CX 5 at 25. He saw Dr. Stewart again on February 12, 2001 and at that point she indicated his carpal tunnel syndrome was stable. Id.

Thereafter, the Claimant returned to carpentry work including both residential and industrial carpentry. CX 8 at 49-54, 57-59, 91-93. Approximately one and one-half years after he left Atkinson, the Claimant began working for AGM Marine for a five-week period between

March 24 and April 21, 2002 and a seven-week period between May 19, 2002 and June 30, 2002. TR 28-29. At AGM Marine the Claimant worked on a pier project in Provincetown, Massachusetts. TR 28; CX 8 at 35-36, 59-60. He testified that the pier was approximately 400 feet in length and wide enough to accommodate a two lane asphalt and concrete vehicle roadway as well as a pedestrian walkway. CX 8 at 59, 62, 65. The Claimant testified that the work he performed was typical carpentry work including the use of various power tools to construct curbing and concrete foundations for light posts. TR 29-37. The Claimant stated that he had continued to experience symptoms of tingling, numbness, tightness, loss of strength and grip in both hands prior to beginning work for AGM. However, he also testified that during his work on the pier the hand symptoms increased and his hands were sore at the end of each day. TR 30. Following the first period of employment with AGM, the Claimant returned home to Maine and he stated that his hand symptoms returned to the level where they were before he performed the work on the pier for AGM. TR 32. During his second stint at AGM, his hand symptoms increased and when he completed the second work period on the pier in June 2002 and returned home for the final time, his symptoms again returned to where they had been before he began work on the pier. TR 37-38. The Claimant testified that over time his hand symptoms, including bilateral pain, have gradually increased. The Claimant has been constructing a house during this period and he stated this work is less strenuous than the work he did at Atkinson and AGM. In addition, he can set his own pace and can vary his activities to accommodate his discomfort, options he did not have working at either Atkinson or AGM. The Claimant stated that he has also worked a three-day shut down at the Bucksport paper mill. TR 42-44.

B. Medical Evidence

The Claimant saw Martha Stewart, D.O., for right hand and forearm pain on January 8, 2001, shortly following his layoff from Atkinson. CX 5 at 24. Dr. Stewart diagnosed right carpal tunnel syndrome and she prescribed a brace. *Id*. By January 29, 2001, Dr. Stewart remarked that the Claimant's carpal tunnel condition was "greatly improved" and she acquiesced in his request to discontinue use of the brace. CX 5 at 25. Dr. Stewart wrote a note dated March 16, 2001 opining that the Claimant's right carpal tunnel syndrome resulted from the work he performed at Atkinson. CX 5 at 26. On December 21, 2001, Dr. Stewart's notes indicate that the Claimant had self-referred to Dr. Keebler for EMG testing. CX 5 at 27.

Peter Keebler, M.D. performed an electrodiagnostic evaluation study on January 11, 2002 and reported that the test findings were consistent with mild bilateral carpal tunnel syndrome, slightly worse on the right. CX 3 at 11.

On January 25, 2002, the Claimant was examined by Richard C. Flaherty, M.D., a plastic and hand surgeon, at the request of his attorney. CX 1 at 1. Dr. Flaherty's notes indicate that the Claimant reported a history of significant numbness and paresthesias in both upper extremities. *Id*. The Claimant reported that he has had the symptoms in his left hand for three years or longer and that he began having the same symptoms in his right hand approximately a year earlier after working at a job that required repeated twisting of heavy gauge wire around a rebar for a period of days over a number of months. *Id*. Dr. Flaherty recommended carpal tunnel release surgery on both sides, but recommended performing the left side first. CX 1 at 2. The Claimant saw Dr. Flaherty again on March 5, 2003 and Dr. Flaherty noted that the Claimant's symptoms have

persisted and he also noted that the Claimant had a positive Tinel's sign which he had not noted in his previous examination of the Claimant. CX 1 at 1, 4.

Dr. Flaherty testified at deposition on February 2, 2004.[3] At this deposition, Dr. Flaherty stated that based upon the Claimant's testimony at the hearing before Judge Sutton regarding the nature of his work at Atkinson, he believed such employment "more likely than not" is implicated as a causal or aggravating factor in the development of the Claimant's carpal tunnel syndrome. CX 9 at 5-6. Dr. Flaherty acknowledged on cross-examination that he was not aware that the Claimant had stopped working for Atkinson in late 2000 and had worked on other construction projects thereafter. CX 9 at 9-11. After learning that the Claimant had continued working in the construction trade in the year between the time the Claimant left Atkinson and the time the Claimant first consulted him, Dr. Flaherty stated that the continued work "perhaps" could have contributed to the carpal tunnel syndrome depending upon "the particulars" of the job. CX 9 at 12-13. Dr. Flaherty testified that the only work the Claimant described was the wire twisting he did at Atkinson, but he also stated that typical carpentry activities such as hammering, sawing, and using power tools after he left Atkinson would be competent to contribute to the cumulative effect that results in carpal tunnel syndrome. CX 9 at 13-14.

At his May 9, 2005 deposition, Dr. Flaherty stated that the only difference in the Claimant's condition from his visit on January 25, 2002 and his visit a year later, on March 5, 2003, was that the Claimant now had a positive Tinel's sign, indicating a slight worsening in his condition. CX 14 at 9. Dr. Flaherty testified that based upon the evidence of the Claimant's work duties at AGM, as recited by Judge Sutton's remand order, he believed that the job at AGM "did play some role in his overall carpal tunnel syndrome…" CX 14 at 9-10, 15. Dr. Flaherty opined that based upon his understanding of the Claimant's duties at AGM, the Claimant's work there likely contributed to the progression of his carpal tunnel syndrome. CX 14 at 15.

On November 10, 2003, the Claimant saw Philip Kimball, M.D. at the request of Atkinson. Dr. Kimball agreed with Dr. Flaherty's surgical recommendation, but he stated that the Claimant's work at Atkinson did not account for his present need for surgery. Dr. Kimball explained that he reached this conclusion because the Claimant's symptoms existed prior to his work at Atkinson, his symptoms on the left were not aggravated sufficiently to require testing or surgery while he worked at Atkinson and, his symptoms continued for two years after he left Atkinson while he was self-employed. ATK EX 1 at 3. For these same reasons, Dr. Kimball testified that in his opinion the Claimant's employment at Atkinson was not an "inciting activity" which necessitated the recommended carpal tunnel surgery. *Id.* However, Dr. Kimball also opined that [the Claimant's] "regular work as a construction worker and carpenter, throughout his life has led to the development, most likely, of his carpal tunnel syndrome, and all of the years of work have contributed to some degree to his left hand condition." *Id.*

C. Causation

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C.

[3] Dr. Flaherty testified by deposition twice. The first was February 2, 2004 and second was on May 9, 2005. CX 9 and CX 14.

902(2). *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. § 920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Brown*, 194 F.3d at 4, *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem*. 600 F.2d 280 (D.C.Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused his harm. *U.S. Industries/Federal Sheet Metal, Inc., v. Dir., OWCP (Riley),* 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Rajotte v. Gen. Dynamics Corp.,* 18 BRBS 85 (1986).

Once a claimant establishes a prima facie case, the claimant has invoked the Section 20(a) presumption, and the burden of proof shifts to employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Dir., OWCP, (Shorette)*, 109 F.3d 53 (1st Cir. 1997); *Merrill*, 25 BRBS at 144; *Parsons Corp. of California v. Dir., OWCP,* 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier,* 16 BRBS at 128. If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995); *Sprague v. Dir., OWCP,* 688 F. 2d 862 (1st Cir. 1982).

There is no dispute among the physicians that the Claimant has bilateral carpal tunnel syndrome, an occupational disease.[4] The Claimant testified that prior to working for Atkinson he experienced occasional numbness and tingling in his left hand and forearm if he used his hand working. He also indicated these symptoms did not last long and subsided after a few days. The Claimant testified credibly that his symptoms of left hand numbness, tingling and pain in the forearm and wrist increased significantly and persisted for a longer period when he was using his upper extremities repetitively twisting heavy gauge wire while working at Atkinson. He also reported that this is when he first noticed symptoms in his right hand.

Dr. Flaherty, the Claimant's physician, testified that the work the Claimant performed at Atkinson was a causal or aggravating factor in the Claimant's development of carpal tunnel

[4] As Judge Sutton's Order of Remand correctly determined, carpal tunnel syndrome is an occupational disease rather than a traumatic injury. CX 10 at 154-155.

syndrome which he initially diagnosed in January 2001. Based upon the Claimant's testimony and Dr. Flaherty's medical opinion that the work activities caused or aggravated the Claimant's carpal tunnel condition, I find that the Claimant has shown that working conditions existed at Atkinson which could have caused or aggravated his bilateral carpal tunnel condition. Thus, the Claimant has established his prima facie case and has successfully invoked the Section 20(a) presumption.

The burden now shifts to Atkinson to rebut the presumption with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Shorette*, 109 F.3d at 53; *Merrill*, 25 BRBS at 144. Atkinson contends that the Claimant's bilateral carpal tunnel condition is not causally related to his employment with the company. Atkinson relies on the medical opinion of Dr. Philip Kimball, who examined the Claimant on November 10, 2003. Although Dr. Kimball agreed with Dr. Flaherty's diagnosis of carpal tunnel and with the surgical recommendation, he concluded that the Claimant's work at Atkinson did not cause the need for carpal tunnel surgery. Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the Section 20(a) presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley*, 34 BRBS at 41-42; *Kier v. Bethlehem Steel Corp*. 16 BRBS 128. In my view, Dr. Kimball's testimony minimally satisfies this standard.

Because I have found that Atkinson has successfully rebutted the presumption that the Claimant's carpal tunnel syndrome is work-related, the presumption no longer controls, and I must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio*, 196 U.S. at 280; *Holmes*, 29 BRBS at 18; *Sprague,* 688 F. 2d at 862. In evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is solely within the discretion of the judge to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). *See Poole v. Nat'l Steel & Shipbuilding Co.*, 11 BRBS 390 (1979); *Grimes v. George Hyman Constr. Co.*, 8 BRBS 483 (1978), *aff'd mem*., 600 F.2d 280 (D.C. Cir. 1979); *Tyson v. John C. Grimberg Co.*, 8 BRBS 413 (1978).

The physicians agree that the Claimant has bilateral carpal tunnel syndrome and that surgery is the recommended course. They disagree as to whether the Claimant's work for Atkinson or AGM caused or aggravated his carpal tunnel condition. Dr. Flaherty has testified that the work the Claimant performed at Atkinson caused or aggravated his carpal tunnel condition. In concluding that the Claimant's carpal tunnel syndrome was not caused by his work at Atkinson, Dr. Kimball pointed to the following three factors (1) the Claimant's symptoms existed before he began working at Atkinson; (2) the symptoms were not aggravated sufficiently to require testing or surgery during the time the Claimant worked at Atkinson; (3) the symptoms persisted for two years after the Claimant left Atkinson and during a period in which he worked for other employers and had periods of self-employment.

The Claimant stated that he had left hand symptoms prior to beginning work at Atkinson, but that those symptoms increased after he went to work for Atkinson. The fact that the Claimant had left hand carpal tunnel symptoms prior to working at Atkinson does not preclude a finding that his duties at Atkinson aggravated a pre-existing carpal tunnel condition. Under the "aggravation rule" an employment-related injury need not be the sole cause or primary factor in a disability and a work-related aggravation of a preexisting condition constitutes an injury within the meaning of the LHWCA. *Turner v. Chesapeake and Potomac Telephone Co*., 16 BRBS 255, 257 (1984); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2nd Cir. 1982). If an employment-related injury contributes to, combines with or aggravates a pre-existing disease, the entire resulting condition is compensable and the relative contributions of the work-related injury and the prior condition are not evaluated to determine the claimant's entitlement to benefits. *Wheatley v. Adler,* 407 F.2d 307 (D.C. Cir. 1968). I have credited the Claimant's testimony that his duties at Atkinson increased the numbness, fatigue, and pain that he had experienced in his left hand. I also credit the Claimant's testimony that his right hand symptoms began during his employment with Atkinson. Indeed, he sought medical treatment from his primary care physician within weeks of his layoff.

The Claimant continued carpentry work after leaving Atkinson. The Claimant has testified that he has continued to experienced bilateral hand pain ever since he worked at Atkinson. The persistence of the bilateral hand conditions after the Claimant left employment at Atkinson does not break the link between his duties at Atkinson and his carpal tunnel syndrome.

With regard to the Claimant's right hand symptoms, Dr. Kimball is simply mistaken as to the onset of this condition. There is no evidence that the Claimant experienced right-hand symptoms before he worked at Atkinson. However, there is ample evidence that the Claimant experienced right hand symptoms during the period he was working at Atkinson and the medical evidence establishes that he sought medical treatment with Dr. Stewart within weeks of leaving employment at Atkinson.

Moreover, Dr Kimball's opinion that the Claimant's work at Atkinson does not account for his present need for surgery is significantly undermined by his statement that the work the Claimant has performed over his life in construction and carpentry led to the development of his carpal tunnel syndrome and all of the years of work have contributed to some degree to his left hand condition. ATK EX 1. If, as Dr. Kimball opined, the Claimant's carpentry work over his work life has contributed to the development of carpal tunnel syndrome, then his work at Atkinson certainly contributed to his current occupational disease. After careful consideration, I conclude that Dr. Flaherty's opinion is entitled to greater weight than that of Dr. Kimball as Dr. Flaherty's opinion is more consistent with the medical evidence, with the Claimant's description of his duties and it is internally consistent. Accordingly, I conclude that the Claimant has established by a preponderance of the evidence that his bilateral carpal tunnel condition was caused by, contributed to, or aggravated by his work at Atkinson.

D. Last Responsible Employer/Carrier

Atkinson contends, in the alternative, that should I find that the carpal tunnel syndrome is an occupational disease related to the Claimant's work, a subsequent maritime employer, AGM

Marine, is responsible for the injury and not Atkinson. Atk. Br. at 8. AGM Marine does not dispute that the Claimant has bilateral carpal tunnel syndrome as a result of workplace activities. AGM Marine Br. at 3. Instead, AGM Marine contends that it is not responsible as Atkinson was the last employer to expose the Claimant to injurious stimuli. *Id*.

Liability under the Act is imposed on the employer during the period in which the Claimant was last exposed to "injurious stimuli" prior to the date on which he became disabled. *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 756 (1st Cir. 1992). Judge Sutton correctly laid out the analysis in his Order of Remand stating:

> In a case such as this, where a claim for medical benefits is filed before the Claimant actually becomes disabled, liability for medical care is imposed on the carrier on the risk at the last time that the worker was exposed to injurious stimuli prior to adjudication of the claim. citing *Bath Iron Works Corp. v. Director, OWCP (Hutchins)*, 244 F.3d 222, 229 (1st Cir. 2001). CX 10 at 155. The injurious exposure required to shift liability to a subsequent employer and carrier need not qualify as an intervening injury; '[u]nder the 'last injurious exposure rule,' *any* exposure to harmful stimuli during an insurer's coverage period will lead to liability if the employee becomes disabled during that period by an exposure-caused injury, even if the most recent exposure was not the primary or triggering cause of the disability.' *Id*. at 228-229.

CX 10 at 155.

The Claimant testified that while working on the Provincetown pier project for AGM, his hand and forearm symptoms increased over the level he experienced before he worked at AGM Marine. Dr. Flaherty noted that the Claimant had a negative Tinel's sign bilaterally when he examined the Claimant on January 25, 2002 but when he examined the Claimant again on March 5, 2003, after he worked at AGM, the Claimant had a positive Tinel's sign bilaterally, indicating a slight worsening of the Claimant's carpal tunnel condition. More importantly, Dr. Flaherty stated that the job duties the Claimant engaged in at AGM Marine likely contributed to the aggravation or progression of the bilateral carpal tunnel condition between January 2002 and March of 2003. CX 14 at 10, 15, 23.[5] As previously discussed, Dr. Kimball also concluded that all of the Claimant's carpentry and construction work over the course of years contributed to his carpal tunnel condition. Although the Claimant had been diagnosed with bilateral carpal tunnel prior to working for AGM Marine, the evidence indicates that his carpal tunnel condition was aggravated or worsened, even if only minimally, by his work on the Provincetown pier project for AGM. The evidence is, therefore sufficient to establish that the Claimant's carpentry work, including hammering, and the use of power tools at AGM Marine exposed him to injurious stimuli sufficient to contribute to his carpal tunnel syndrome subsequent to the time he left

[5] AGM Marine does not dispute that the Claimant has bilateral carpal tunnel syndrome as a result of workplace activities. AGM Marine Br. at 3. Instead, AGM Marine contends that it is not responsible as Atkinson was the last employer to expose the Claimant to injurious stimuli. *Id*.

Atkinson in late 2000.[6] *See Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1285 (9th Cir. 1983) (last employer covered by the Longshore Act to expose a worker to injurious stimuli is held liable for any benefits awarded under the Act.) *cert. denied*, 466 U.S. 937 (1984). As noted above, the claim is for medical benefits, specifically surgery, as the Claimant is currently working and is not disabled as a result of carpal tunnel syndrome at this point. As Atkinson has established that the Claimant was exposed to injurious stimuli after he left Atkinson and during the period he worked at AGM Marine, a maritime employer, Atkinson has succeeded in avoiding liability. AGM Marine was the last maritime employer to expose the Claimant to stimuli that exacerbated or aggravated his underlying carpal tunnel syndrome. Accordingly, I find that AGM Marine/AIG Insurance is the responsible employer/carrier liable for the Claimant's carpal tunnel syndrome.

E. Section 8(f) Relief From Liability

Section 8(f) of the Act limits an employer's liability for permanent partial disability, permanent total disability and death benefits to a period of 104 weeks, after which compensation liability is assumed by a Special Fund established pursuant to 33 U.S.C. § 944, when the disability or death is not due solely to the injury which is the subject of the claim. 33 U.S.C. § 908(f); *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198, 200 (1949). To avail itself of relief under this provision, an employer or insurance carrier must file a fully supported application for Section 8(f) relief with the District Director, Office of Workers' Compensation Programs ("OWCP"). 33 U.S.C. § 908(f); 20 C.F.R. § 702.321 (2004). On November 17, 2004, AGM Marine/AIG Insurance filed an application for Special Fund Relief under section 8(f) of the Act with the District Director.[7] By the express terms of Section 8(f), relief from liability may be available provided the disability is permanent in nature. In the present case, the Claimant seeks prospective temporary total disability for anticipated periods of disability following carpal tunnel release surgery. The Claimant has not alleged permanent disability, no permanency rating has been provided by the Claimant's physicians or the employer's medical expert, and AGM Marine/AIG has not, and could not, argue that the Claimant has reached maximum medical improvement, as he has not yet had the recommended surgery. AGM Marine's/AIG's

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[6] AGM Marine's request that I note "how little time was spent working for AGM," does not relieve it of liability. *See Hutchins,* 244 F.3d at 228-229, ("any exposure to harmful stimuli during an insurer's coverage period will lead to liability if the employee becomes disabled during that period by an exposure caused injury, even if the most recent exposure was not the primary or triggering cause for the disability.").

[7] In addition to filing a timely and sufficiently documented application, an employer must meet three requirements to avail itself of Section 8(f) relief: (1) the employee must have had a pre-existing permanent partial disability; (2) the pre-existing disability must have been manifest to the Employer; and (3) in cases of permanent partial disability, the current disability must be materially and substantially greater than that which would have resulted from the subsequent injury alone. *Dir., OWCP v. Bath Iron Works Corp.*, 129 F.3d 45 (1st Cir. 1997); *Perry v. Bath Iron Works Corp.*, 29 BRBS 57, 58 (1995) (*Perry)*. In the context of Section 8(f), a pre-existing permanent partial disability is one that would motivate a cautious employer to terminate an employee due to an enhanced risk of consequent compensation liability. *C&P Tel. Co. v. Dir., OWCP (Glover)*, 564 F.2d 503, 512 (D.C. Cir. 1977). Medical records in existence at the time of the subsequent injury from which the condition was objectively determinable satisfy the manifest requirement. *Dir., OWCP v. Universal Terminal & Stevedoring (De Nichilo)*, 575 F.2d 452, 454-57 (3d. Cir. 1978); *Topping v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 40, 43-44 (1983).

application for relief from liability under the Act is denied as premature.[8] If following the recommended surgery, the Claimant's disability were to become permanent, AGM Marine/AIG could seek Special Fund relief at that point.

F. Compensation Due

Based on the foregoing findings, the Claimant will be owed temporary total disability compensation pursuant to Sections 8(b) of the Act from the date of his carpal tunnel release surgery until his return to work at a rate of 66 and two-thirds percent of his average weekly wage of $1,403.94 while employed at AGM.

G. Entitlement to Medical Care

Based on my findings that the Claimant's bilateral carpal tunnel syndrome is related to his employment with AGM Marine, he is entitled to reasonable and necessary medical care pursuant to Section 7 of the Act. 33 U.S.C. § 907; *Colburn v. Gen. Dynamics Corp*., 21 BRBS 219, 222 (1988). A Claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates that treatment was necessary for a work-related condition. The Claimant is currently receiving treatment for his carpal tunnel syndrome and surgery has been recommended. On these facts, I find that the Claimant has established that he is entitled to medical care including planned carpal tunnel release surgery and payment of EMG testing at Eastern Maine Medical Center performed on January 12, 2002, payment of an emergency room visit at Houlton Hospital in December 2004 and physical therapy prescribed thereafter, and office visits related to his carpal tunnel syndrome made to Dr. Stewart. Accordingly, I will order the AGM Marine/AIG to provide reasonable and necessary medical care pursuant to Section 7.

H. Attorney Fees

Having successfully established his right to medical benefits and prospective temporary total disability compensation following prescribed surgery, the Claimant is entitled to an award of attorneys' fees under Section 28(a) of the Act. *Lebel v. Bath Iron Works Corp.*, 544 F.2d 1112, 1113 (1st Cir. 1976); *American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976). On July 18, 2005 the Claimant's attorney filed an itemized application for attorney's fees and costs in the amount of $8001.40. In my order, the Respondents will be granted 15 days from the date this Decision and Order is filed with the District Director to file any objection to the fee petition.

[8] In addition, even if an award of Special Fund relief under Section 8(f) were made, Section 8(f) does not relieve an employer of its liability for a claimant's medical benefits pursuant to Section 7(a). *Barclift v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 418, 421 (1983), *rev'd on other grounds sub nom Dir., OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295 (4th Cir. 1984); *Scott v. Rowe Mach. Works*, 9 BRBS 198, 200-01 (1978); *Spencer v. Bethlehem Steel Corp*., 7 BRBS 675, 677 (1978); *Duty v. Jet America, Inc*., 4 BRBS 523, 531 (1976).

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

(1) The Employer, AGM Marine, and its insurance carrier, AIG Insurance, shall furnish the Claimant, Mathew Bolstridge, such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related bilateral carpal tunnel condition may require pursuant to 33 U.S.C. § 907;

(2) The Employer, AGM Marine, and its carrier, AIG Insurance, shall pay to the Claimant temporary total disability compensation pursuant to 33 U.S.C. § 908(b) of the Act from the date of his carpal tunnel release surgery to the date of his return to work at a rate of 66 2/3 percent of the average weekly wage of $1, 403.94;

(3) The Employer shall have fifteen (15) days after this Decision and Order is filed with the District Director to file any objections to the attorney fee application;

(4) All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts